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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte GARY STEPHEN SHUSTER*

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Appeal 2007-3007  
Application 09/932,431  
Technology Center 2100

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Decided: March 14, 2008

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Before JOSEPH L. DIXON, LANCE LEONARD BARRY, and  
ST. JOHN COURTNEY III, *Administrative Patent Judges*.

BARRY, *Administrative Patent Judge*.

DECISION ON APPEAL

I. STATEMENT OF THE CASE

A Patent Examiner rejected claims 21-36. The Appellant appeals therefrom under 35 U.S.C. § 134(a). We have jurisdiction under 35 U.S.C. § 6(b).

#### A. INVENTION

The invention at issue on appeal operates a group of servers in a computer network. (2d Amended App. Br.<sup>1</sup> 2.) The group transmits files to destinations on the network via a communication link of finite bandwidth. (*Id.* 2-3.) According to the Appellant, prior-art methods for managing bandwidth created a bottleneck for network traffic at a gateway point. His invention, however, employs separate software modules in communication with each other to monitor usage of bandwidth downstream at a common communication link and implement traffic control measures upstream at the source of data. (*Id.* 3.)

#### B. ILLUSTRATIVE CLAIM

Claim 21, which further illustrates the invention, follows.

21. A method for operating a server group to improve bandwidth efficiency in a computer network, wherein the server group is operable to transmit files between the server group and destinations on the computer network through a communication link having a finite bandwidth, the method comprising:

monitoring bandwidth usage of a communication link for connecting a server group to a wide area network, using software operably associated with the communication link;

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<sup>1</sup> We rely on and refer to the second Amended Appeal Brief of September 6, 2006, in lieu of the first Amended Appeal Brief of July 17, 2006 and the original Appeal Brief of April 5, 2006, because the latter two were defective. We have considered neither the first amended brief nor the original brief in deciding this appeal.

distributing a rule set to individual servers of the server group, wherein the rule set defines rules for limiting serving of data from the individual servers depending on file type and a current state of the bandwidth usage;

characterizing files stored in operable association with the individual servers according to type, using software operating on the individual servers;

informing the individual servers of the current state of the bandwidth usage as monitored by the software operably associated with the communication link; and

serving the files from the individual servers to the wide area network via the communication link in compliance with the rule set, so as to limit serving of specified file types from the servers during periods when the bandwidth usage exceeds a threshold amount relative to a finite bandwidth of the communication link.

#### C. REJECTION

Claims 21-36 stand rejected under 35 U.S.C. § 102(e) as anticipated by U.S. Patent No. 6,578,077 ("Rakoshitz").

#### III. ISSUE

"Rather than reiterate the positions of parties *in toto*, we focus on an issue therebetween." *Ex parte Kuruoglu*, No. 2007-0666, 2007 WL 2745820, at \*2 (BPAI 2007). The Examiner "believes that [col. 9, ll. 27-38 and col. 8, ll. 44-55] from Rakoshitz should be sufficient in proving that [its] bandwidth management tool can be deployed at multiple locations in a

variety of network scenarios." (Substitute Ans.<sup>2</sup> 6-7.) The Appellant argues that the reference "does not disclose distributing different interoperable bandwidth management modules at different network locations." (2d Amended App. Br. 9-10.) Therefore, the issue is whether the Examiner has shown that Rakoshitz teaches different software modules distributed at different locations in a network but in communication with each other.

"Both anticipation under § 102 and obviousness under § 103 are two-step inquiries. The first step in both analyses is a proper construction of the claims . . . . The second step in the analyses requires a comparison of the properly construed claim to the prior art." *Medichem, S.A. v. Rolabo, S.L.*, 353 F.3d 928, 933, (Fed.Cir. 2003) (internal citations omitted).

#### IV. CLAIM CONSTRUCTION

"The Patent and Trademark Office (PTO) must consider all claim limitations when determining patentability of an invention over the prior art." *In re Lowry*, 32 F.3d 1579, 1582 (Fed. Cir. 1994) (citing *In re Gulack*, 703 F.2d 1381, 1385 (Fed. Cir. 1983)). Here, claim 21 recites in pertinent part the following limitations:

monitoring bandwidth usage of a communication link for connecting a server group to a wide area network, using software operably associated with the communication link;

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<sup>2</sup> We rely on and refer to the Examiner's Answer of February 8, 2007 in lieu of the original Examiner's Answer. We have not considered the original Answer in deciding this appeal.

...

characterizing files stored in operable association with  
the individual servers according to type, using software  
operating on the individual servers;

informing the individual servers of the current state of the bandwidth usage as monitored by the software operably associated with the communication link . . . .

Claim 29 recites similar limitations. Considering all the limitations, the two independent claims require different software modules distributed at different locations in a network but in communication with each other.

#### V1. ANTICIPATION ANALYSIS

1 "[A]n invention is anticipated if the same device, including all the claim limitations, is shown in a single prior art reference. Every element of the claimed invention must be literally present, arranged as in the claim."

*Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236 (Fed.Cir. 1989) (citing *Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 894 (Fed. Cir. 1984); *Kalman v. Kimberly-Clark Corp.*, 713 F.2d 760, 771-72 (Fed. Cir. 1983)). "[A]bsence from the reference of any claimed element negates anticipation." *Kloster Speedsteel AB v. Crucible, Inc.*, 793 F.2d 1565, 1571 (Fed. Cir. 1986).

Here, Rakoshitz describes a "bandwidth management tool **208**[, which] can be predominantly software based . . . ." (Col. 9, ll. 24-25.) Rather than being implemented as different software modules distributed at different locations in a network, however, "in some, if not all embodiments, the [reference's] invention can be implemented at a single point of access such as a computer terminal or firewall . . . ." (Col. 3, ll. 21-23.) Such

embodiments "provide[ ] a single point or a single region to manage telecommunication traffic including directory services and bandwidth management." (*Id.* ll. 18-20.) Similarly, the first passage of Rakoshitz cited by the Examiner teaches that "[t]he tool can be deployed at any appropriate point in the network data path" (col. 9, ll. 33-34), i.e., at any *single* point that is appropriate.

The second passage of Rakoshitz cited by the Examiner discloses that "the present tool can be applied to a private WAN [i.e., wide area network] link to . . . an access to a server farm (e.g., a group of servers located in a special part of the network close to an access link, e.g., in a web hosting environment)." (Col. 8, ll. 46-50.) In view of the prior teachings regarding deploying the tool at a single point, however, we interpret this disclosure to mean that a single tool can be located at a single point on the link to the server farm. Figure 5 of the reference shows such an arrangement wherein a "tool 505 is coupled between LAN [i.e., local area network] 501 and router 507" (col. 11, ll. 23-24), and the LAN "is coupled to network elements including web servers 503, 511, 513" (*id.* ll. 21-22), which constitute a server farm.

The second passage of Rakoshitz cited by the Examiner explains that "the [reference's] invention can be applied to key servers (e.g., database/web server) within an organization servicing internal and/or external users." (Col. 8, ll. 51-53.) Although such an application would involve the

deployment of multiple tools, the reference does not teach that the tools would communicate with each other.

The absence of different software modules distributed at different locations in a network but in communication with each other negates anticipation. Therefore, we reverse the anticipation rejection of claims 21 and 29 and of claims 22-28 and 30-36, which depend therefrom.

#### VI. ORDER

In summary, the rejection of claims 21-36 under § 102(e) is reversed.

REVERSED

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